RE COURT HILL CANTEEN; GOVERNMENT OF MALAYSIA v. WAN ESAH

[O.C.J. (Raja Azlan Shah J.) October 28, 1972]

[Kuala Lumpur — Orginating Motion No. 62 of 1972]

Practice and Procedure — Injunction — Application for perpetual injunction to restrain respondent from entering premises — Whether case should proceed by way of writ or originating motion — Specific Relief (Malay States) Ordinance, 1950, s. 51.

The applicant sought by way of originating motion for a perpetual injunction to restrain the respondent, her servant or agent from entering the premises known as Court Hill Canteen.

Held: a perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail.

Case referred to:-

(1) *L.* v. *L.* [1969] 1 All E.R. 852.

ORIGINATING MOTION.

Ahmad Fairuz bin Datuk Sheikh Abdul Halim (Federal Counsel) for the applicants.

Karam Singh for the respondent.

Raja Azlan Shah J. (delivering oral judgment): This is an application by way of originating motion by the Government of Malaysia for a perpetual injunction restraining the respondent, her servant or agent from entering the premises known as Court Hill Canteen.

The motion was filed on 11th October 1972. In substance the affidavit says that the respondent executed an agreement with the applicants to run the Court Hill Canteen. There is a provision providing for two months' written notice to terminate the agreement. The applicants are not satisfied with the running of the canteen and they accordingly terminated the agreement with the required notice. The respondent failed to vacate and so the applicants have brought this motion.

The ground put forward by counsel for the respondent, though seemingly narrow, is of crucial importance; that is, this case should have been proceeded by way of writ and not by way of originating motion. Counsel cited section 51 of the Specific Relief (Malay States) Ordinance, 1950, which provides that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. He accordingly says that the originating motion is not a suit, and therefore the motion is misconceived.

I think the law is very clear. A perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail. There is another point. One can bring an action for perpetual injunction before filing a writ of summons in a case of urgency. That is clear from the case of *L.* v. *L.*[1] That was a divorce petition where the wife applied *ex parte* for an injunction to restrain the husband from removing the children of the marriage from her custody. The wife proposed to petition for divorce but no petition had been filed. The court held that this does not prevent the issue of an injunction until the action is launched provided it is a case of urgency.

In the present case the motion was filed on 11th October 1972 and up till today there is no indication by way of affidavit or otherwise that the applicants intend to file a writ, nor is there any indication that this is a case of urgency.

The motion is dismissed with costs

Motion dismissed.

ARBIAH v. AZINOL

[A.C.J. (Suffian F.J.) November 1, 1972]

[Kuala Lumpur — Civil Appeal No. 52 of 1971]

Stamp — Stamp duty — Contract — Written agreement unstamped — Impounding — Duty of court — Stamp Ordinance, 1949, ss. 41, 47, 51 & 52 — Courts of Judicature Act, 1964, ss. 29 & 69.

The plaintiff/respondent contracted to build a house for the defendant/appellant. They had entered into several written agreements. In this case it was common ground that one document (Ex P1) was chargeable with stamp duty, but it had not been stamped at all. In the court below, the learned president applying section 52 of the Stamp Ordinance, 1949, considered that P1 was inadmissible and ignored its contents except by way of introductory background. He gave judgment for the plaintiff and dismissed the defendant/appellant's counterclaim. On appeal the defendant/appellant applied by notice of motion for the High Court to impound P1 so that after payment of duty and penalty it might be admitted and its contents taken into account.

Held: (1) P1 should normally have been stamped before or at the time of execution, but it could also be stamped after execution on payment of a penalty in addition to stamp duty;

(2) in the circumstances of the case the defendant/appellant should pay the whole amount of the duty and penalty.

Case cited in argument:

Fresh Food & Refrigerating Co. Ltd. v. *Syme & Co. — Behr Mathew Ltd.* [1935] M.L.J. 196.

CIVIL APPEAL.

Mohamed Azom Shuja for the appellant.

Gurdial Bakan Singh for the respondent.

Suffian F.J.: The plaintiff (respondent) is a builder. He contracted to build a house for the defendant (appellant).

The defendant paid the plaintiff, but the plaintiff alleged that the defendant owed him more. He sued the defendant for that amount, and the defendant counterclaimed for various expenses.

There were several written agreements entered into between the parties, but we are concerned at this stage of this appeal with only one document (Exhibit P1). It was common ground that P1 was chargeable with stamp duty, but it had not been stamped at all. The learned president who tried the case, applying section 52 of the Stamp Ordinance, 1949, considered that P1 was inadmissible and ignored its contents except by way of introductory background.